



Chege v Serwin & 4 others (Environment and Land Case Civil Suit 030 of 2021) [2022] KEELC 15572 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15572 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 030 OF 2021
EK WABWOTO, J
DECEMBER 20, 2022
IN THE MATTER OF SECTION 38 OF THE LIMITATION OF
ACTION ACT, CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL
PROCEDURE RULES 2010
AND
IN THE MATTER OF ADVERSE POSSESSION
AND
IN THE MATTER OF L.R. NO. 209/2389/145
KENYA

BETWEEN

STEPHEN GITHAE CHEGE PLAINTIFF

AND

LEPEYOK SERWIN 1ST DEFENDANT

CHIEF LANDS REGISTRAR 2ND DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT

ROCKLIGHT VENTURES LIMITED 5TH DEFENDANT



JUDGMENT

1. The plaintiff filed this suit by way of an originating summons dated August 9, 2021 which was later amended on October 8, 2021. The plaintiff sought the following orders:-
 - a. Spent..
 - b. Spent..
 - c. The plaintiff is entitled to be registered as the lessee of the parcel of land known as LR No 209/2389/145, Pangani Nairobi on grounds of adverse possession.
 - d. The defendants herein do register the plaintiff as the bonafide lessee o/2389/145 to enjoy the remainder of the term of lease if any and in the alternative be allowed to renew the said lease if expired.
 - e. The defendants by themselves, tenants/servants and or agents or any other persons claiming on the defendants behalf be restrained from selling, transferring, leasing, disposing or interfering in any other manner with the plaintiff peaceful possession of LR No 209/2389/145.
 - f. Costs of this application be in the cause.
2. The originating summons was supported by an affidavit sworn by the plaintiff on August 9, 2021 together with further affidavits sworn by the plaintiff on 4th and October 8, 2021.
3. The suit was opposed by the defendants through a replying affidavit sworn by Pulli Serwon one of the administrators of the 1st defendant on December 10, 2021, the 2nd and 4th defendant through a replying affidavit sworn by C.K. Ngetich on December 14, 2021, the 3rd defendant filed grounds of opposition dated September 10, 2021 seeking for dismissal of the suit.
4. The plaintiff testified on December 14, 2021 as the sole witness to support his case. He stated that he had been employed by the 1st defendant as a gardener to work in the suit property in 1993 and that he worked there until 1997 when the 1st defendant left the suit property. It was also his testimony that when the 1st defendant left, he never came back and he has never heard from him since then neither does he know of his current whereabouts.
5. The plaintiff averred that he has stayed in the suit property with his family since then and nobody has ever interfered with his stay. The plaintiff also stated that he has never been evicted from the land and has stayed there for over 12 years and hence he is seeking for a claim to the suit property through adverse possession.
6. On cross-examination by counsel for the 1st defendant, he stated that he was employed by the 1st defendant in 1993 and it was not true that the 1st defendant had died. He also stated that he was never given any documentation confirming his employment since the same was done *vide* an oral agreement. He also stated that at the time of his employment he was earning Kshs 1,200/- . On further cross-examination, he stated that the property had houses but there were no tenants. The 1st defendant was staying in one of the houses with some people whom he did not know their relationship to the 1st defendant. He also stated that when he visited the lands office, he was issued with a copy of the title which showed that the title had been issued to Pulli Serwon and Pedho Serwon on April 19, 2018 and further that the same had been transferred to Rocklight Ventures Limited on July 26, 2019 for a sum



- of Kshs 33,000,000/- He also stated that he did not know that the property had been sold to other third parties at the time of filing suit.
7. On cross examination by counsel for the 2nd and 4th defendants, he stated that he did not know whether the 1st defendant was dead or alive neither does he know any of his children. He also stated that when he did a search on September 14, 2021, it showed that the land had been sold to someone else.
 8. On cross examination by counsel for the 5th defendant, he stated that he did not know that the 1st defendant had died in 1991. He also stated that he has not made any payments for rates neither did he have any ownership documents. He also conceded that the documents from the ministry of lands are authentic.
 9. On cross examination by counsel for the 3rd defendant, he stated that the county government of Nairobi is a relevant party to the case since they have records showing that the 1st defendant is the registered owner of the suit property.
 10. Vincesia Juma a land's registrar testified as DW1. She stated the suit property initially belonged to Juma Lepyok Serewin who is now deceased. She also stated that upon the death of the 1st defendant, there was a succession cause No 662 of 1991 that was filed and a confirmation of grant subsequently issued on January 31, 1996 to Pulli Serown and Pedho Serown as the administrators of the estate. It was her testimony that the administrators, transferred the property to the 5th defendant herein through a transfer dated June 10, 2019 and there have been no further transactions in respect to the said property since then.
 11. Upon cross-examination, she stated that the 1st defendant is deceased though she did not have a copy of the death certificate in court. She also stated that as per her document that was produced in evidence, the date of the transfer was missing. She also stated that the property was sold for a consideration of Kshs 33,000,000/= but she was not sure of any stamp duty was paid. She also stated that she did not know the 1st defendant at a personal level neither did she know the number of children that he had.
 12. Rajan Dhanani a director of the 5th defendant testified as DW2. He stated that he visited the suit property when it had two people staying on it. The said property was dilapidated. He also stated that he did a search before purchasing the same. A sum of Kshs 33,000,000/= was paid and they were granted vacant possession and that he did not know the plaintiff and neither did he know whether he was residing in the said property. He also urged the court to adopt his witness statement dated November 25, 2021 as his evidence in chief.
 13. On cross-examination, he stated that he purchased the property in 2019 but the sale agreement had been done in 2016. He also stated that the purchase price of Kshs 33,000,000/= was done vide a bank transfer and he did not have the receipts for payment in court. He also stated that stamp duty was paid but did not have evidence of payment of the same.
 14. On re-examination by his counsel, he stated the negotiations for the purchase of the property started in the year 2016 when the initial purchase price was set at Kshs 28,000,000/= then later increased to Kshs 33,000,000/= upon which the assessment of stamp duty was done.
 15. After the close of the respective parties' cases, all the parties were directed to file and exchange their written submissions which direction were compiled by all the parties.
 16. The plaintiff filed submissions dated June 21, 2022 through the firm of Onyango Odhiambo & Co Advocates. The plaintiff submitted on the following six issues: -



- a. Whether the plaintiff herein bonafide owner of the suit property by virtue of adverse possession.
 - b. Whether the purported administrators of the 1st defendant have locus to defend the suit herein.
 - c. Whether the agreement herein annexed is admissible in court.
 - d. Whether the 5th defendant is the bonafide registered owner of the suit property.
 - e. Whether the 3rd defendant has been wrongfully joined in this suit.
 - f. Whether the evidence by the defendants is sufficient to tilt the scale in their favour.
17. On the first issue, counsel submitted that the plaintiff has met the criteria for proving adverse. That he has been in occupation of the suit property since 1993 when he was an employee of the 1st defendant earning Kshs 1,200 per month. It was submitted that the 1st defendant left the suit property in 1997 and never returned and the plaintiff has continued to stay there with his family and also taking care of the suit property. That his possession and occupation of the suit property has been interrupted for over 25 years.
 18. It was submitted that no evidence was provided to this court to show that indeed the 1st defendant was deceased.
 19. Counsel cited the cases of *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184 and *Celina Muthoni Kithinji v Safina Binti Swaleh & 8 others* [2018] eKLR in support of the first issue.
 20. The plaintiff also submitted that the purported administrators of the 1st defendant have no locus to defend the suit because they never filed any application for substitution.
 21. The plaintiff also submitted that the sale agreement was produced in court was not admissible since it was not dated nor executed and hence the same is null and void.
 22. On whether the 5th defendant is the bonafide owner of the suit property, the plaintiff submitted that the same cannot be the position since there is no evidence that of any transfer being undertaken by the legal representatives of the 1st defendant. It was also stated that for a transaction to be complete and valid in the instant case there ought to have been the following: -
 - i. A resolution by the directors of the 5th defendant authorizing one of its directors to transact on its behalf.
 - ii. Transfer of the suit property from the purported legal representative to Rajan Rajnikant Dhanani the purported purchaser
 - iii. Transfer of the suit property from one of the 5th defendant's directors.
 - iv. Evidence of payment of stamp duty.
 - v. Evidence of payment of purchase price.
 23. That in view of the foregoing the 5th defendant cannot be a bonafide owner of the suit property and neither is it a purchaser for value since there is no proof of payment of purchase price. Reference was made to the case of *Lawrence P. Mukiri Mungai v A, G & 4 others* [2017] eKLR.
 24. The plaintiff also submitted that the 3rd defendant was a necessary party to this suit by the fact that it has records for payment of rates made in respect to the suit property and from its records, the 1st defendant was listed as the proprietor of the suit property.



25. The plaintiff concluded his submissions by urging the court to find that the defendants evidence was not sufficient to tilt the scales of justice in their favour and urged the court to grant the orders sought by the plaintiff as prayed
26. The 1st defendant filed his submissions dated July 27, 2022 through the firm of Owara Idah Emily Advocate. Counsel submitted on the following issues:
 - i. Whether the plaintiff has met the threshold of adverse possession.
 - ii. Whether the administrators of the 1st defendant have locus standi to represent the estate of the 1st defendant
 - iii. Whether the plaintiff suit is merited.
27. Relying on the cases of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 Others* [2018] eKLR, *Kimani Ruchine v Swift Rutherford & Co Ltd* (1980) KLR, *Teresa Wachuka Gachira v Joseph Mwangi Gachira* civil appeal No 325 of 2003 and *Gabriel Mbui v Mukindia Maranya* [1993] eKLR and submitted that the plaintiff has not proved the ingredients of adverse possession to warrant him get the orders sought.
28. It was submitted that the suit property had never been left idle by the 1st defendant. That the same was occupied by the tenants of the estate of the 1st defendant and to which the administrators of the 1st defendant collected rental income and distributed amongst the beneficiaries of the 1st defendant's estate. The distribution of the rental income from the suit property was evidenced by statements of accounts found on pages 15-22 of the annexures accompanying the 1st defendant's replying affidavit dated December 10, 2021.
29. The 1st defendant contended that the plaintiff had never been in possession of the suit property and neither was he employed by the 1st defendant as a gardener in 1993 since the 1st defendant had passed away in 1991 and there is no way the plaintiff could have been employed by a dead person. The plaintiff had also failed to indicate the specific house in which he was staying in the suit property.
30. On whether the administrators of the 1st defendant have the *locus standi* to represent the estate of the 1st defendant, it was submitted that the 1st defendant was deceased having passed on March 2, 2021 at Wanguhu farm Trans-Nzoia District. The deceased died intestate and was survived by Zahra Serwon, Pulli Serwon, Pedho Serwon, Ibrahim Serwon and Yahya Serwon. A confirmation of grant was issued on August 29, 2017 and Pulli Serwon and Pedho Serwon took over the administration of the 1st defendant estate after being issued with a confirmation of grant and that the said confirmation of grant has never been revoked nor challenged. Reference was also made to section 82 (a) of the *Law of Succession Act* and the cases of *Alexander Mutunga Wathome v Peter Lavu Tumbo & Another* [2015] eKLR and *Clemence M Kangoma & another v T.S.S Transporters Co Ltd* [2021] eKLR to the effect that the administrators of the 1st defendant have the locus to represent the estate of the 1st defendant.
31. On whether the draft sale agreement between the estate of the 1st defendant and the 5th defendant is admissible, the 1st defendant relying on the case of *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* eKLR, submitted that it is not for the court to rewrite the contract for the parties. The plaintiff was not privy to the contract between the parties and therefore cannot dictate what was to be included in the contract.
32. Counsel concluded his submissions by urging the court to dismiss the suit with costs to the defendants.



33. The 2nd and 4th defendants, filed their submissions dated July 26, 2022 together with supplementary submissions dated October 24, 2022. In their submissions, four issues were outlined for determination by the court. These were:-
- i. Whether the plaintiff herein should be registered as the bonafide owner of the suit property.
 - ii. Whether the purported administrators of the 1st defendant have locus to defend the suit herein.
 - iii. Whether the 5th defendant herein is the bonafide registered owner of the suit property.
 - iv. Whether the evidence by the defendants is sufficient to tilt the scale in their favour.
34. Relying on the provisions of section 7 and 13 of the *Limitation of Actions Act* and the Court of Appeal cases of *Wambugu v Njuguna* (1983) KLR 173, *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, *Samuel Kihamba v Mary Mbaisi* [2015] eKLR and *Gabriel Mbui v Mukindia Maranya* [1993], counsel argued that the plaintiff had not established the necessary ingredients of adverse possession and hence the suit ought to be dismissed.
35. It was also submitted that the administrators of the 1st defendant have the locus to defend the suit having obtained certificate of confirmation of grant dated January 31, 1996.
36. On whether the 5th defendant is the bonafide registered owner of the suit property, it was argued that Pulli Serown and Pedho Serown as the administrators of the estate of Juma Lopeyok Serown transferred the suit property to the 5th defendant on June 10, 2015 which transfer was recorded as entry number 2 in the documents at the land's office and hence therefore the 5th defendant is the bonafide registered owner of the suit property.
37. The 2nd and 4th defendant also joined the 1st defendant's in submitting that the evidence adduced by the defendants witnesses was sufficient to tilt the scales in their favour since the suit property is registered in the names of the 5th defendant as per the records of the land's registry.
38. The 2nd and 4th defendant also referred to the death certificate which was produced pursuant to an order made by this court during trial showing that indeed the 1st defendant died on March 2, 1991 and there was no way that the plaintiff would have been employed in 1993 by a dead person.
39. It was also submitted that if at all the court was to be persuaded with the testimony given by the plaintiff to the effect that he was an employee of the 1st defendant then his entry to the suit property would be deemed to have been permissive on the ground of employment as was held in the cases of *Delamere Estates v Ndungu Njai & others* [2006] and *Wellington Luswe Baras & 75 others v Lands Limited & Another* [2014] eKLR.
40. In view of the foregoing submissions, the court was also urged to dismiss the suit with costs.
41. The 3rd defendant filed its written submissions dated July 26, 2022 through the law firm of Amadi & Amadi Advocates. Counsel for the 3rd defendant outlined the following issues for determination by the court:-
- i. Whether the plaintiff has acquired the title deed by adverse possession.
 - ii. Whether the 5th defendant is the bonafide registered owner of the suit property.
 - iii. Whether the plaintiff has raised any cause of action against the 3rd defendant.
42. Relying on the cases of *Wambugu v Njuguna* (1983) KLR 173, *Mbira v Gachuhi* (2002) IEALR 137 and *Jandu v Kirpal & another*, the 5th defendant argued that the plaintiff has not enjoyed an



- uninterrupted occupation of the suit property since during the alleged occupation of the suit property the same was being administered by the beneficiaries of the 1st defendant who later sold it to the 5th defendant and that the 1st defendant no longer has any rights over the said property. It was also argued that the plaintiff has not proved that the title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period.
43. It was also submitted that the 5th defendant is the bonafide owner of the suit property having bought the same. The 5th defendant had no knowledge of the occupation by the plaintiff and that the plaintiff's possession of the land was not continuous, uninterrupted and exclusive.
 44. The 3rd defendant urged the court to dismiss the suit since no cause of action existed against it in respect to the plaintiff's claim.
 45. The 5th defendant filed its written submissions dated July 27, 2022. Four issues were outlined for consideration by the court. These were; -
 - i. Whether the plaintiff has met the threshold for adverse possession of the suit property.
 - ii. Whether the 5th defendant is the absolute registered proprietor of the suit property.
 - iii. Whether the draft agreement between the 5th defendant and the administrators of the 1st defendant's estate is admissible.
 - iv. Whether the plaintiff's suit is merited.
 46. On the first issue, it was submitted that before purchasing the suit property, the 5th defendant conducted due diligence and found that the suit property was registered in the names of the 1st defendant herein. It was also established that the same was not in vacant possession since it had tenants staying in the apartments that were constructed on the said property. It was also argued that the plaintiff has never been in occupation of the suit property and is a stranger to the same. The cases of *Mtana Lewa v Kabindi Ngala* (supra), *Mbira v Gachubi* (supra) among others were cited in support.
 47. In reference to section 26 (1) of the [Land Registration Act](#) No 3 of 2012, it was also argued that the 5th defendant being the current registered owner of the suit property, enjoys absolute ownership whose title can only be challenged on the grounds of fraud or misrepresentation in obtaining the title.
 48. On whether the draft agreement between the 5th defendant and the administrators of the 1st defendant's estate is admissible, it was argued that same has not been challenged by the parties privy to the contract and no evidence of any undue influence, fraud has been proven and in the absence of the above, the agreement is legally binding upon the parties.
 49. The 5th defendant concluded its submissions by pointing that the plaintiff's suit is not merited given the fact that the plaintiff has failed to satisfy the necessary requirements for adverse possession. The court was urged to dismiss the plaintiff's claim.
 50. The court has now carefully considered the amended originating summons, the evidence adduced by the parties and the written submissions filed together with the existing legal framework and the main issues for determination is: -
 - i. Whether the plaintiff has met the criteria of an adverse possession in respect to LR No 209/2389/148.
 - ii. What are the appropriate reliefs to issue herein?



51. For one to succeed in a claim for adverse possession, one must prove that he has been in exclusive continuous occupation of the suit land for a period of at least 12 years, which occupation must be open and notorious and should be without permission of the owner; *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion), See- Nyeri Court of Appeal case No22 of 2013, Peter Mbiri Michuki v Samuel Mugo Michuki.
52. In *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* [2018] eKLR, the court explained the conditions to be met for one to prove an entitlement in adverse possession. The court proceeded to quote various authorities which explain the entitlement and I wish to borrow fully from the decision and capture it as hereunder;

“The requirements for adverse possession in Kenya has also been set out in the case of *Mbira v Gachubi* (2002) I EALR 137 in which the court held that:

.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”
53. Given the nature of the plaintiff’s claim, it is important to underscore that before a claim for adverse possession can be deemed to have been proven, it is incumbent upon the claimant to demonstrate that same has been in actual, visible, open and notorious occupation and possession of the portion of land which is the subject of adverse possession.
54. Similarly, the claimant must also tender evidence that the occupation or possession has been non-permissive actual possession, which is hostile to the title of the current owner. In this regard, the actual possession must relate to a defined, definite and distinct portion and the impugned occupation must be exclusive. On the other hand, the other set of ingredients that must be demonstrated and proven relates to the fact that the possession must be continuous, uninterrupted and unbroken for the necessary statutory duration, same being the twelve (12) year period. See section 7, 12, 13 and 17 of the Limitations of Actions Act, chapter 22, Laws of Kenya.
55. From the testimony that was adduced, the 5th defendant’s witness disputed the fact that the plaintiff is on the suit property and had been there for a period of over 12 years. The defendants submitted that the plaintiff has not met the necessary ingredients to succeed in a claim of adverse possession.
56. The plaintiff stated in his testimony that he came to the suit property by virtue of employment by the 1st defendant in 1993 wherein he was earning a monthly salary of Kshs 1,200/- until 1997 when the 1st defendant left and never returned. On cross examination he stated that he was not aware that the 1st defendant had died and neither did he know any of his children.
57. The court was furnished with a death certificate issued on March 20, 1991 indicating that the 1st defendant died on March 2, 1991 in Trans Nzoia District. The plaintiff did not adduce any evidence to the contrary challenging this fact. In view of the foregoing, it remains unclear as to who exactly dealt with the plaintiff in 1993. The evidence of the death of the 1st defendant on March 2, 1991 totally deflates the balloon bearing the plaintiff’s testimony. It baffles this court as to why would the plaintiff peddle lies and falsehood despite tendering his testimony under oath. There is no way the plaintiff could have been employed by a dead person in the year 1993 as alleged.
58. Even if I was to consider the plaintiff evidence that indeed he was employed by the 1st defendant in 1993 when he came to the suit property, this fact also defeats the plaintiff’s claim for adverse on the basis that



being an employee of the 1st defendant when he entered the suit property, he was permitted to do so and reside there and as such the purported occupation of the plaintiff to the suit land was permissive on the ground of employment. This was the position taken in the case of Delamere Estates v Ndungu Njai & others [2006] and Wellington Luswe Baras & 75 others v Lands Limited & another [2014] eKLR that were cited by the 2nd and 4th defendants.

59. In the instant case, from the documentary and oral evidence that was adduced, it was also evident that that the plaintiff was not using the said property exclusively to his possession since there were other tenants staying in the said property. The Court of Appeal in the case of Harison Kaara v Gichobi Kaara & another (1997) eKLR, held that: -

“In other words the adverse possessor must show that he is using the land as though it is solely his own before a right of action to recover it can be said to have occurred for the limitation period to start running”

60. The plaintiff did not produce any evidence to show that he occupied the suit premises or run a business in the same, or that he has put up a home. It is therefore the finding of this court that after considering the evidence of the parties together with their written submissions, the plaintiff has failed to prove his case to the required standard and his claim for adverse possession fails.
61. On what reliefs should issue, having found that the plaintiff has not satisfied the ingredients and or elements to succeed in a claim of adverse possession, he is not entitled to any of the reliefs sought since the same are not for granting.
62. In the end, the amended originating summons dated October 8, 2021 is not merited and the same is dismissed in its entirety which an order that each party bears own costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2022

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Odhiambo for the Plaintiff.

Mr. Menge for the 2nd and 4th Defendant.

N/A for the 3rd Defendant.

Ms. Odhiambo h/b for Ms. Owora for 1st Defendant and also h/b for Mr. Churchil Midwa for the 5th Defendant.

Court Assistant; Caroline Nafuna.

